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In the Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL.,
PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

2. Whether the requirement that non-exempted, non-grandfathered group health plans include coverage of contraceptives violates the Free Exercise Clause of the First Amendment.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. See App., *infra*, 1a-45a.

STATEMENT

This case raises no question about the sincerity or centrality of the Hahns' religious commitments. And the government's argument in no sense depends on the proposition that people of faith must check their religious convictions at the door when they enter the commercial arena, nor does it denigrate the guiding role religion plays in the daily lives of millions of Americans. However, exempting Conestoga Wood Specialties Corporation from a neutral and generally

applicable law regulating the health benefits of its employees (whose religious beliefs may differ from those of the corporation's owners) would mark an unprecedented departure from this Nation's traditions, this Court's Free Exercise Clause jurisprudence, and the evident intent of Congress when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* The government's position in this case reflects the most appropriate understanding of our Constitution, laws, and traditions. It avoids intractable line-drawing problems and the risks of judicial entanglement in religious affairs, and it demonstrates an appropriate and necessary respect for the vibrant religious pluralism that thrives under the protections our Constitution affords.

1. The full statutory and regulatory background of this case is set out in the government's opening brief in *Sebelius* v. *Hobby Lobby Stores, Inc.*, cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014) (Gov't *Hobby Lobby* Br.). It is provided in condensed fashion here.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] establishes certain minimum standards for group health plans and health-insurance issuers offering coverage in the group and individual markets. The Act generally requires group health plans to cover four categories of recommended preventive-health services without cost sharing, that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance.

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage provision). As particularly relevant here, the Act requires coverage of preventive care and screenings for women as provided in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011).

After obtaining the assistance of the Institute of Medicine in developing comprehensive guidelines for preventive services for women, 77 Fed. Reg. 8725-8726 (Feb. 15, 2012), HRSA issued guidelines that include "'[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed" by a health-care provider. *Id.* at 8725 (quoting the guidelines) (brackets in original); see App., *infra*, 40a-45a. The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to here as the contraceptive-coverage provision).

The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer," which is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious

activities of any religious order. 45 C.F.R. 147.131(a) (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)). The regulations also provide accommodations for the group health plans of other religious non-profit organizations that have religious objections to providing coverage for some or all contraceptive services. 45 C.F.R. 147.131(b). If an organization invokes an accommodation, the women who participate in its plan will generally have access to contraceptive coverage without cost sharing through an alternative mechanism established by the regulations, under which the organization does not contract, arrange, pay, or refer for contraceptive coverage. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

2. Petitioners are Conestoga Wood Specialties Corporation (Conestoga) and five individuals who own the corporation (collectively referred to here as the Hahns). Pet. App. 12a, 7b-8b. Conestoga manufactures wood cabinets and other wood specialty products in five facilities around the United States. *Id.* at 12a, 6g; see http://www.conestogawood.com/about (last visited Feb. 7, 2014).

Conestoga has approximately 950 full-time employees. Pet. App. 11g (First Amended Verified Compl., ¶ 37). Employees of the corporation obtain health coverage through the Conestoga group health plan. *Ibid.* (First Amended Verified Compl., ¶ 36).

"The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite)," Pet. App. 12a n.5, and opposes certain contraceptives "that 'may cause the demise of an already conceived but not yet attached human embryo,'" *id.* at 12a (quoting First Amended Compl., ¶ 45). In this suit, petitioners contend that the requirement that the

Conestoga group health plan cover all forms of FDA-approved contraceptives as prescribed by a health-care provider violates RFRA, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b); see Pet. App. 9a. Specifically, petitioners contend that RFRA entitles the Conestoga plan to an exemption from the contraceptive-coverage provision because the Hahns object to being required to "pay for, facilitate, or otherwise support" certain contraceptives. *Id.* at 12a. Petitioners also contend that the contraceptive-coverage provision violates the Free Exercise Clause of the First Amendment. *Id.* at 9a.

The district court denied petitioners' motion for a preliminary injunction, holding that they had not established a likelihood of success on the merits of their claims. Pet. App. 1b-45b.

3. After denying an injunction pending appeal, see 2013 WL 1277419, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-93a.

a. The court of appeals held that Conestoga, a "for-profit, secular corporation," is not a person engaged in the exercise of religion within the meaning of RFRA or the Free Exercise Clause. Pet. App. 14a; see *id.* at 14a-28a. The court explained that it was "not aware of any case preceding the commencement of litigation about the [contraceptive-coverage provision] in which a for-profit, secular corporation was itself found to have free exercise rights." *Id.* at 19a. The court rejected petitioners' contention that, "because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that

for-profit, secular corporations can exercise religion." *Id.* at 21a.

The court of appeals also rejected petitioners' invitation to treat Conestoga as if it were indistinguishable from the Hahns. Pet. App. 23a-27a. The court explained that "'incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created' the corporation." *Id.* at 26a (quoting *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001)). "Since Conestoga is distinct from the Hahns," the court reasoned that the contraceptive-coverage provision "does not actually require *the Hahns* to do anything." *Ibid.* Instead, "[a]ll responsibility for complying" with the provision "falls on *Conestoga*." *Ibid.*

b. Judge Jordan dissented. Pet. App. 30a-93a. He opined that "for-profit corporations like Conestoga" may assert religious exercise rights under RFRA and the Free Exercise Clause, *id.* at 49a, and that, in analyzing the corporation's claim, it is appropriate to disregard the corporate form and treat Conestoga as "nothing more than the common vision of five individuals," *i.e.*, the Hahns, *id.* at 60a. Because "the Hahns' Mennonite faith forbids them not only from using certain contraceptives, but from paying for others to use them as well," *id.* at 76a, Judge Jordan concluded that the contraceptive-coverage provision "requires the Hahns and Conestoga to take direct actions that violate the tenets of their Mennonite faith," *id.* at 75a-76a.

Judge Jordan also opined that the contraceptive-coverage provision fails to satisfy RFRA's compelling-interest test, Pet. App. 79a-87a, and that it is not a

neutral law of general applicability for purposes of the First Amendment's Free Exercise Clause, *id.* at 87a-89a.

4. The court of appeals denied petitioners' request for rehearing en banc by a 7-5 vote. Pet. App. 2c.

SUMMARY OF ARGUMENT

The Hahns' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings, and their personal beliefs merit the full measure of protection that the Constitution and laws provide. But the *Hahns'* beliefs, although deeply held, do not justify an injunction under the Free Exercise Clause or the Religious Freedom Restoration Act exempting *Conestoga* from an obligation to comply with a generally applicable law that regulates only that corporation (not its individual owners) and that provides Conestoga employees with privately enforceable health benefits.

1. The contraceptive-coverage provision does not violate the Free Exercise Clause of the First Amendment. The provision is a neutral law of general applicability, and the Constitution therefore does not entitle petitioners to a religion-based exemption from it. See *Employment Division* v. *Smith*, 494 U.S. 872, 876-890 (1990). Petitioners misunderstand the free-exercise test for neutrality and general applicability when they point to features of the Affordable Care Act and its implementing regulations that make the contraceptive-coverage provision less than universally applicable. None of those features has the purpose or effect of targeting religious exercise. Moreover, both statutory exemptions and phased implementation of new laws are common. It cannot be that their pres-

ence renders a law other than neutral or generally applicable for purposes of the Free Exercise Clause.

2. Petitioners' contention that RFRA provides a for-profit corporation with a right to deny its employees federally-mandated benefits and protections fails for a variety of reasons. Petitioner Conestoga, a for-profit corporation that manufactures and sells kitchen cabinets, is not itself a person exercising religion within the meaning of RFRA. Conestoga's RFRA claim also violates fundamental corporate-law principles because it attributes the religious beliefs of the corporate shareholders to the corporation itself. Petitioners' alternative suggestion that the Hahns may challenge the contraceptive-coverage provision in their individual capacities (as owners, managers, and directors) likewise fails because the challenged provision imposes no personal obligations on the Hahns. It instead regulates only the corporation they own and the group health plan the corporation sponsors.

Although the Hahns' religious beliefs are sincerely held, in this pluralistic nation of many faiths, some religious practices must "yield to the common good." *United States* v. *Lee*, 455 U.S. 252, 259 (1982). While religious accommodations are available in a variety of contexts, there are powerful legal and practical reasons to exclude requests from for-profit corporations (and individuals in their capacity as owners, managers, or directors) to exempt themselves from laws meant to protect others.

Such accommodations would visit tangible harm on an identifiable group of third parties, namely the corporation's employees and their covered dependents. This Court has expressly cautioned that courts "must take adequate account of the burdens a re-

quested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005). A rule requiring religion-based exemptions for for-profit corporations would also create difficult problems of corporate governance (related to how to define a corporation's religious beliefs and commitments) and tilt the competitive playing field (by permitting exemptions from laws that still bind an exempted corporation's competitors). Moreover, permitting for-profit corporations to seek religion-based exemptions from generally applicable law would create serious entanglement concerns, as courts would have no choice but to conduct a detailed examination to determine whether any given corporation is sufficiently "religious" to warrant an accommodation.

Permitting for-profit corporations to seek religion-based exemptions from generally applicable law would also have the perverse effect of undermining the special place of religious institutions in our society. Congress has in many cases extended religious accommodations to churches and other non-profit religious entities, but has drawn the line at for-profit corporations. Petitioners' contention that any such distinction is arbitrary is impossible to square with this Nation's traditions. If accepted, it would discourage Congress from providing accommodation to non-profit religious entities out of fear that doing so would automatically entitle for-profit corporations to the same accommodation. Finally, the concern occasioned by the sweeping nature of petitioners' approach to RFRA is compounded by their view that courts must accept a plaintiff's claim that his religious exercise is substantially burdened. That view, which excludes any application of normal legal rules that serve to limit claims of inju-

ry and redress, threatens to subject much of the United States Code to RFRA's compelling-interest test.

The contraceptive-coverage provision in any event is supported by compelling interests and is the least restrictive means of achieving them. The preventive-services coverage provision grants participants and beneficiaries in the Conestoga group health plan privately enforceable benefits as part of a comprehensive insurance system established by law. The exemption petitioners seek would deny those individuals the health coverage to which they are legally entitled as part of their employment compensation—and which Congress intended to make available generally through all forms of coverage available under the Affordable Care Act. The provision also serves compelling interests in public health and gender equality. Those interests are supported by a wealth of empirical data demonstrating that providing women access to contraceptives without cost sharing can have significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems.

Petitioners' proffered alternatives—government payment for contraceptive services for Conestoga's employees or creation of new tax credits for contraceptive expenses—are not less-restrictive means within the meaning of RFRA. The less-restrictive means test under RFRA cannot be used to require creation of entirely new programs. Moreover, in both the preventive-services coverage provision and the Act generally, Congress built upon the system of employment-based coverage and private insurance, rather than replacing it with government-provided benefits. Petitioners' proffered alternatives would

conflict with that goal. Petitioners' alternatives would also create barriers to access and would defeat Congress's goal of affording women seamless employment-based health coverage of recommended preventive services without cost sharing.

ARGUMENT

The Hahns assert that their sincere religious objection to Conestoga's provision of employee health coverage that includes certain forms of contraceptive services entitles the corporation to an exemption from the federal law requiring such coverage. Although petitioners claim this exemption as a matter of constitutional right, the Free Exercise Clause plainly does not require it. Under *Employment Division* v. *Smith*, 494 U.S. 872, 876-890 (1990), the federal government and the States may constitutionally enact contraceptive-coverage requirements. Indeed, more than half the States have done so.

Petitioners' claim thus depends on the proposition that when Congress enacted RFRA, it intended not only to restore pre-*Smith* free-exercise jurisprudence, but also to uniquely disable the federal government by working a dramatic expansion of the scope of cognizable religious liberty claims. Neither petitioners nor their amici have identified a single case from this Court that has invalidated a statute, or required an exemption, on the ground that the Free Exercise Clause required such a result to protect the rights of a for-profit corporation or of the owners, managers, or directors of the corporation.

There is good reason to conclude that Congress did not intend any such dramatic expansion. There is no tradition in our Nation of providing for-profit corporations with religion-based exemptions from neutral and

generally applicable laws. Our traditions instead reflect an understanding that to carve out an exemption based on the asserted exercise of religion by for-profit corporations would upset the balance not simply between adherents and the government, but rather among adherents, the government, and employees and other third parties who may not share the religious views of the corporation's owners. Rejecting petitioners' request to recognize for the first time religious exercise by for-profit corporations reflects not hostility to the religious views of the corporate owners, but rather a necessary respect for the religious pluralism of the society in which such corporations operate and which the Free Exercise Clause seeks to preserve and promote.

Rejecting petitioners' reworking of RFRA likewise avoids intractable problems of administration. As petitioners would have it, the definition of "substantial[] burden" (42 U.S.C. 2000bb-1(a)) under the statute is solely in the hands of the plaintiff, and the government must justify any refusal to accommodate that burden in any federal statute with a penalty for noncompliance under a compelling-interest test. Against that backdrop, the imputation to for-profit corporations of the religious views and RFRA rights of their individual owners could wreak havoc on federal administrative schemes, enabling for-profit companies to object not only to the critical women's preventive-health coverage at issue here, but also to requirements that for-profit corporations cover recommended vaccinations, pay a minimum wage, or pay certain taxes. Moreover, the specter of shareholder proxy fights to establish the religious beliefs of a corporation is one that Congress could not have intended. And the

proposed solution—that this new right be limited only to "closely held" corporations—lacks any principled grounding in logic or the text of RFRA and raises its own set of line-drawing problems.

Ultimately, this case is not about whether the individual petitioners have strongly held religious beliefs worthy of protection—they do. It is instead about whether those beliefs override the determination by Congress concerning the benefits and burdens that accrue to employees of a for-profit corporation that operates in the stream of commerce.

I. THE CONTRACEPTIVE-COVERAGE PROVISION DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

Petitioners' contention that the Free Exercise Clause of the First Amendment entitles them to deprive Conestoga employees and covered dependents of contraceptive-coverage benefits required by law (Br. 43-48) is without merit.

This Court has never held that a for-profit corporation has rights under the Free Exercise Clause or that the owners of such a corporation may invoke that Clause to insist upon special statutory exemptions for the corporation based on their own religious beliefs. More generally, in applying the Free Exercise Clause, this Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of [this Court's] free exercise jurisprudence contradicts that proposition." *Smith*, 494 U.S. at 878-879. The Free Exercise Clause does not relieve an individual (much less a for-profit corporation) of the obligation to comply with a "valid and

neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). As the Court has recognized, it is precisely because of this country's vibrant religious diversity that the Constitution does not presumptively subordinate the myriad basic obligations of civil society to the assertions of religious belief or obligation by adherents of particular faiths. See *id.* at 888. To adopt such a constitutional rule "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U.S. 145, 166-167 (1879).

Petitioners' claim is particularly problematic because the exemption they seek would result in the direct imposition of burdens on an identifiable group of third parties, namely Conestoga employees and their covered dependents, who may not share petitioners' religious beliefs and who have their own autonomy and dignity interests. This Court has never held, or even suggested, that the Constitution requires an exemption for a commercial employer that would "operate[] to impose the employer's religious faith on the employees," *Lee*, 455 U.S. at 261, by denying them benefits to which they are entitled under federal law. See *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 85 P.3d 67, 93 (Cal.) ("We are unaware of any decision in which * * * [this Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption

would detrimentally affect the rights of third parties."), cert. denied, 543 U.S. 816 (2004). Petitioners never acknowledge the consequences of the exemption they seek for Conestoga employees and covered dependents.

Thus, quite aside from the obstacles posed by Conestoga's status as a corporate employer, petitioners' constitutional contention is foreclosed by *Smith*. Petitioners therefore are left to contend (Br. 43-48) that the contraceptive-coverage provision is not neutral or generally applicable. Petitioners are mistaken.[2] A law is not neutral if its "object * * * is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (*Lukumi*); see *Smith*, 494 U.S. at 878 (referring to a law that is "specifically directed at * * * religious practice"). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. But both the women's preventive-services coverage provision in general, and the contraceptive-coverage provision in particular, were put in place to improve women's access to recommended preventive services and to lessen the disparity between men's and

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[2] Accord *O'Brien* v. *United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1160-1162 (E.D. Mo. 2012), appeal docketed, No. 12-3357 (8th Cir.); *Korte* v. *United States Dep't of Health & Human Servs.*, 912 F. Supp. 2d 735, 743-746 (S.D. Ill. 2012), rev'd on other grounds, 735 F.3d 654 (7th Cir. 2013), petition for cert. pending, No. 13-937 (filed Feb. 6, 2014); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 870 F. Supp. 2d 1278, 1288-1290 (W.D. Okla. 2012), rev'd on other grounds, 723 F.3d 1114 (10th Cir. 2013) (en banc), petition for cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014); Pet. App. 22b-24b.

women's health-care costs. See *O'Brien*, *supra* note 2, 894 F. Supp. 2d at 1161. Petitioners cite no evidence that those provisions were enacted to target religious exercise or specifically to impose burdens on religiously motivated conduct, and there is none.

Petitioners' principal contention (Br. 44) is that the preventive-services coverage provision is not neutral or generally applicable because (i) the provision is, in effect, phased in gradually as employers make changes to their health plans, and (ii) employers with fewer than 50 full-time-equivalent employees are exempt from a potential tax penalty if they do not provide any health coverage. Petitioners misunderstand the effect of both provisions to which they refer. See pp. 52-55, *infra*. More to the point, neither provision reflects any religious animus or even remotely results in the application of the contraceptive-coverage provision "only [to] conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545; see *Korte*, *supra* note 2, 912 F. Supp. 2d at 743-746; Pet. App. 23b. For example, there is no reason to believe that only employers with religious objections to contraceptive coverage have transitioned to being subject to the preventive-services coverage provision or that such objecting employers are disproportionately represented among those with 50 or more full-time-equivalent employees.

More fundamentally, it cannot be the case that any phased-in compliance with a federal requirement, or a statutory exemption for small employers, renders the requirement not generally applicable and thus potentially unconstitutional under the Free Exercise Clause. Federal statutes often include exemptions or phased implementation like the provisions at issue

here. When Title VII of the Civil Rights Act was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees. See *Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 505 n.2 (2006). Even now, those prohibitions do not apply to employers with fewer than 15 employees. See *id.* at 504-505. Similarly, the Social Security Act, 42 U.S.C. 301 *et seq.*, originally did not cover agricultural or domestic workers. See *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); see *Lee*, 455 U.S. at 258 n.7 (noting additional ways in which Social Security Act's coverage was "broadened" over the years). Those features of Title VII and the Social Security Act have never been thought to render the laws suspect under the Free Exercise Clause.

Finally, the fact that the government has provided an exemption and accommodations for certain religious nonprofit organizations (Pet. Br. 44; see pp. 3-4, *supra*) does not mean that the contraceptive-coverage provision has "the unconstitutional object of targeting religious beliefs and practices." *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997). The exact opposite is true. "[T]he religious employer exemption presents a strong argument in favor of neutrality, demonstrating that the 'object of the law' was not 'to infringe upon or restrict practices because of their religious motivation.'" *O'Brien*, 894 F. Supp. 2d at 1161 (quoting *Lukumi*, 508 U.S. at 533); see Pet. App. 24b.

II. PETITIONERS' RFRA CHALLENGE TO THE CONTRACEPTIVE-COVERAGE PROVISION FAILS

Petitioners' statutory claim under RFRA also fails. They cannot demonstrate that Conestoga, a for-profit manufacturer, is a person exercising religion within the meaning of that statute, or that the contraceptive-

coverage provision imposes any legally cognizable substantial burden on any religious exercise by petitioners. Even if petitioners could surmount those threshold barriers to relief, their claims would still fail because the contraceptive-coverage provision is narrowly tailored to satisfy the government's compelling interests in ensuring the statutorily guaranteed benefits of Conestoga's employees and their covered dependents, protecting their health, and promoting their equality.

A. Petitioners Do Not State A Cognizable RFRA Claim

Petitioners do not cite a single case predating litigation over the contraceptive-coverage provision in which a court held that either the Free Exercise Clause or RFRA entitled a for-profit corporation—or its owners, managers, or directors—to a corporate exemption from generally applicable business or employment regulation. To the contrary, this Court has held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. *Lee* rejected the free-exercise claim of a sole proprietor personally subject to liability for violating the generally applicable provision he challenged. See Gov't *Hobby Lobby* Br. 18. The logic of that decision is even more compelling when such a claim is advanced by a for-profit corporation, such as Conestoga. *Lee* is part of the pre-*Smith* jurisprudence that Congress meant RFRA to restore, see *id.* at 15-16, and its rule should dispose of this case.

1. As the government explained in its *Hobby Lobby* brief (at 15-22), Congress intended RFRA to *restore* statutorily this Court's pre-*Smith* jurisprudence, not to create a vast new array of statutory free-exercise claims. Absent from that pre-*Smith* body of law is any case extending free-exercise rights to for-profit corporations, based either on a claim that the corporation itself was exercising religion, or on a claim that a corporate exemption was necessary to vindicate the free-exercise rights of individual corporate owners, managers, or directors. There is no indication in RFRA's text or legislative history that Congress meant the statute to take the dramatic step of affording such rights. See *ibid.*

To the contrary, there is substantial reason to conclude that Congress did not intend RFRA to collapse the distinction at the core of the "first principle of corporate law": that a corporation and its shareholders are separate and distinct entities. Corporate & Criminal Law Professors Amicus Br. 3; see Gov't *Hobby Lobby* Br. 23-26; *Bradfield* v. *Roberts*, 175 U.S. 291, 298 (1899) ("Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.").

Similarly, there is no reason to believe that Congress intended to exempt for-profit corporations from neutral and generally applicable laws regulating their commercial activity, on the theory that such

exemptions would be required to protect the free-exercise rights of individuals associated with the corporation. See Gov't *Hobby Lobby* Br. 26-31.[3] That bar to individually based relief exists whether the individual petitioners attempt to advance their RFRA claim in their capacity as owners, managers, or directors. See *ibid.* The contraceptive-coverage provision regulates Conestoga and its group health plan, not the individual petitioners.

Petitioners' contention to the contrary based on the role of the Hahns as corporate managers is analogous to the one rejected by this Court in *Braswell* v. *United States*, 487 U.S. 99 (1988). In that case, the president and sole shareholder of a corporation was served with

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[3] Petitioners point out (Br. 21) that individual corporate officers can under certain circumstances be personally liable for violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Such individual liability flows from that statute's unique definition of "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d); see 29 U.S.C. 203(a); see also *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973) (discussing the "expansiveness of the [FLSA's] definition of 'employer'"). The statutes at issue here include no comparable provisions.

Contrary to petitioners' suggestion (Br. 21, 42), the fact that Conestoga has elected to be taxed as "a 'subchapter S' corporation is of no matter." *Smith Setzer & Sons, Inc.* v. *South Carolina Procurement Review Panel*, 20 F.3d 1311, 1318 (4th Cir. 1994). "Congress created S corporations to give small businesses the benefits of the corporate form, such as limited liability for shareholders, without the disadvantage of corporate taxation." *Durando* v. *United States*, 70 F.3d 548, 551 (9th Cir. 1995); see generally *Gitlitz* v. *Commissioner*, 531 U.S. 206, 209-210 (2001). When a business elects to be classified as an "S corporation" for federal tax purposes, it remains an entity entirely distinct from its owners. See *Smith Setzer & Sons*, 20 F.3d at 1318.

a grand jury subpoena for corporate records. See *id.* at 101. The president could "assert[] no self-incrimination claim on behalf of the corporation[]" because "it is well established that such artificial entities are not protected by the Fifth Amendment." *Id.* at 102. But the president still moved to quash the subpoena on the ground that the act of producing the demanded records would personally incriminate *him* as an individual. See *id.* at 101. The Court rejected that claim, explaining that the president, when responding to the subpoena on behalf of a corporation wholly owned by him, "cannot be said to be exercising [his] personal rights and duties nor to be entitled to [his] purely personal privileges." *Id.* at 110 (quoting *United States* v. *White*, 322 U.S. 694, 699 (1944)). The Hahns' claims as individuals fail for the same reasons.

2. Petitioners' amici suggest (though without any logical explication) that corporations whose shares are publicly traded would not be in a position to assert a RFRA claim, and they predict that claims for RFRA exemptions by closely held corporations (or their owners, managers, or directors) would be unlikely to arise frequently. See, *e.g.*, Christian Booksellers Ass'n Amicus Br. 7, 25. But petitioners and their amici assert that the circumstances here—a small family group's owning the shares of a corporation and also managing it on a day-to-day basis—justify the conclusion that petitioners' free exercise of religion will be denied if the corporation must adhere to a neutral law of general applicability that requires it to take steps the owners find objectionable on religious grounds. *E.g.*, Pet. Br. 17-19.

The government does not question the importance of religious exercise to the Hahns or to the millions of

other believers in this Nation. Nor does the government fail to appreciate that faith guides adherents throughout their day, including when they carry out responsibilities as corporate managers and directors. Rather, the government's interpretation of RFRA follows from the reality that our Nation is "made up of people of almost every conceivable religious preference." *Lee*, 455 U.S. at 259 (quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961)). Accordingly, "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Ibid.* Thus, under RFRA, just as in this Court's pre-*Smith* jurisprudence, "[r]eligious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Ibid.* (quoting *Braunfeld*, 366 U.S. at 606). The exemption sought in this case—by a for-profit corporation seeking an exemption from generally applicable employment regulation to the detriment of its employees and their dependents—goes beyond that point.

The interpretation of RFRA that the government advocates here and in *Hobby Lobby*, which is based on fundamental tenets of corporate law and employment regulation, is not "arbitrary" (Pet. Br. 45). It is supported by powerful legal and practical justifications.

a. A corporate exemption from generally applicable employment regulation would visit direct and significant harm on an identifiable group of third parties: the individuals whom the corporation employs in order to earn a profit for its owners, and the family members who are dependent on those employees. In the typical religious-accommodation case, it is

the government, and its general interest in uniform enforcement of the law, that would bear the burden of the requested accommodation. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-437 (2006) (*O Centro*). By contrast, the burden imposed by an employer's exemption from generally applicable employment regulation is qualitatively different: it would be borne by employees and their dependents.

The employer in such cases is thus asking not only that the government accommodate the employer's religious exercise, but also that the employees be compelled to do so, through sacrifice of their own statutorily guaranteed rights. In this case, that would mean that Conestoga employees and their covered dependents, none of whom is a party to this litigation, would be deprived of the freedom the Act affords them to elect to receive or not to receive contraceptive services according to their own consciences, medical needs, and health-care providers' advice. If those employees did choose to receive such medical services, they would have to pay for the services (or if they could not afford them, go without the services) that Congress intended their group health plan to cover without cost sharing—and that Congress makes generally available to American women, whether they obtain coverage from an employer, purchase individual coverage on a health-insurance exchange, or are eligible for a government health-benefits program such as Medicaid. Conestoga's employees, many of whom may not share petitioners' religious beliefs, would be forced to sacrifice their own rights under the Act and, in effect, finance petitioners' religious exercise out of their own pockets.

This Court has never permitted a for-profit employer (corporate or individual) to obtain a religious accommodation that comes at the expense of its employees.[4] In *Lee*, for example, the Court emphasized that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," 455 U.S. at 261, who would lose the Social Security benefits to which they were entitled by federal law. Similarly, both of the free-exercise decisions cited in RFRA (*Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)) ruled for the plaintiffs only after determining that the requested accommodation would not significantly impinge on the interests of third parties. See Gov't *Hobby Lobby* Br. 40-41.

In construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*—which was modeled on RFRA and includes the same substantial-burden and compelling-interest tests, see *O Centro*, 546 U.S. at 436—the Court held that courts "must take adequate account of

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[4] Indeed, the Court has held that, under certain circumstances, a statutorily mandated accommodation that imposes burdens on employees can violate the Establishment Clause. Compare *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-711 (1985) (holding that a statute requiring employers to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause), with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334-340 (1987) (concluding that Title VII's exemption for religious employers from its prohibition on religious discrimination does not violate the Establishment Clause as applied to non-profit activities of a church).

the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (citing *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985)). The Court likewise emphasized that "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722. The exemption sought in this case is not at all measured, and it would override the significant interest of Conestoga's employees and their covered dependents. It is exceedingly unlikely that Congress intended RFRA to provide religious accommodations that impose such consequences. Yet extending RFRA to for-profit corporations would predictably do so.

b. Granting for-profit corporations a religious exemption from neutral and generally applicable laws would also be a sharp departure from our Nation's traditions of religious accommodation.

Petitioners and their amici correctly point to a long history in this country of accommodating the religious exercise of churches, non-profits, and other religious bodies. Petitioners then make the categorical submission that a "distinction between for-profit and non-profit corporations cannot be imposed in the arena of religious exercise." Pet. Br. 31; see *id.* at 47 (calling the distinction "arbitrary"). According to petitioners, therefore, this Court's prior recognition that "churches, schools, hospitals, [and] charities" can exercise religion for purposes of the First Amendment and RFRA, see *id.* at 25-26 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (*Hosanna-Tabor*), and *O Centro*, *supra*), compels the conclusion that for-profit corporations can do so as well and must be afforded similar accommodations upon request, see *id.* at 25-28.

One searches in vain for evidence of a tradition of affording for-profit corporations religious accommodations comparable to those traditionally afforded to churches and other religious bodies. This Court's Free Exercise Clause and RFRA cases provide no such evidence. And Congress has perceived a fundamental difference between religious non-profit organizations and for-profit corporations; it has extended religious exemptions from generally applicable regulations to the former but not to the latter.

For example, Congress exempted from Title VII's prohibition on religious discrimination in employment "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities." 42 U.S.C. 2000e-1(a); Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253. And, three years before enactment of RFRA, Congress adopted a parallel exemption in the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 12113(d)(1) (Supp. V 2011). It has long been understood that these exemptions extend only to non-profit religious institutions. See *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 733-735 (9th Cir.) (O'Scannlain, J., concurring), cert. denied, 132 S. Ct. 96 (2011); 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 80, at 61 (perm. ed., rev. vol. 2010) (noting that a "religious corporation" is a "special class of *nonprofit* corporation[]") (emphasis added).

State law likewise provides no evidence of any established tradition of religion-based exemptions for-profit corporations. The experience of States with

contraceptive-coverage regulation provides one compelling example: 28 States require insurers to cover contraceptives, and only one—Illinois—affords religious exemptions with respect to policies for covered employers beyond churches and religious schools, charities, and hospitals. See Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives* 2-3 (Feb. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

This Court has drawn precisely the distinction petitioners disparage as arbitrary. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987), this Court rejected an Establishment Clause challenge to the Title VII religious-discrimination exemption, which a church had invoked to discharge an employee who failed to observe the church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. See *id.* at 330 & n.4, 334-340. In reaching that result, the Court emphasized that its holding did not extend to a situation where a church attempted to enter the "commercial, profit-making world." *Id.* at 337; see *id.* at 340 (Brennan, J., concurring) ("[T]hese cases involve a challenge to the application of [Title VII's] categorical exemption to the activities of a *nonprofit* organization.").

This distinction is rooted in the "nature, history, and purpose" (*First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 779 n.14 (1978)) of the Free Exercise Clause. As Judge Brown has explained for the D.C. Circuit, the right to free exercise "has largely been understood as a personal one." *Gilardi* v. *Department of Health & Human Servs.*, 733 F.3d 1208, 1212 (2013), petitions

for cert. pending, Nos. 13-567, 13-915 (filed Nov. 5, 2013 and Jan. 30, 2014); *School Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963) ("[The purpose of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."). In addition, this Court has long recognized "the foundational principle that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause." *Gilardi*, 733 F.3d at 1213. Since the Founding (and for millennia before), believers have formed religious bodies and communally exercised their religion through them. See *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (observing that the "very existence" of "religious groups" is "dedicated to the collective expression and propagation of shared religious ideals").

It greatly diminishes the unique and deeply rooted place of churches and other religious institutions in our society to posit, as petitioners do (*e.g.*, Br. 31), that they are no different from a corporation selling products for profit. See *Hosanna-Tabor*, 132 S. Ct. at 706 (rejecting notion that First Amendment treats "religious and secular groups alike" and emphasizing the Amendment's "special solicitude to the rights of religious organizations"). And it would make legislative accommodations for religious organizations less likely if the consequence of doing so were to entitle for-profit corporations to an exemption of parallel scope, on the ground that any distinction between the two categories is "arbitrary." Pet. Br. 47.

Contrary to petitioners' suggestion (Br. 31-32), a policy limiting religious accommodations to churches and religious non-profits is not based on a quirk of the

tax code. Religious corporations, see *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815), and "eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education," *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 645 (1819), existed long before enactment of the Internal Revenue Code. Indeed, "by the time the First Amendment was adopted, general incorporation laws existed *only* for religious corporations," and "for-profit corporations—which were typically special-purpose entities, unlike modern general-purpose business corporations—required special state charters." Cal. Amicus Br. 18. Consistent with that fundamental and longstanding dichotomy, Blackstone noted the "division of corporations * * * into ecclesiastical and lay" and explained that, in the case of the former, "the members that compose it are entirely spiritual persons" and create the corporation "for the furtherance of religion, and [to] perpetuat[e] the rights of the church." 1 William Blackstone, *Commentaries on the Law of England* 458 (1765).

c. Permitting for-profit corporations to seek religion-based exemptions from generally applicable business regulation would also create serious problems for both corporate governance and free-market competition. Although petitioners rely (Br. 24-25) on the definition of "person" in the Dictionary Act, 1 U.S.C. 1, to support their position that RFRA's use of the word "person" means that RFRA's protections extend to all corporations, they make no effort to address the practical problems such a reading would generate. See also Gov't *Hobby Lobby* Br. 21-22.[5]

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[5] Petitioners' Dictionary Act argument is also at odds with RLUIPA, RFRA's sister statute that is typically interpreted in

If petitioners' mechanical application of the Dictionary Act were correct, then large publicly traded corporations would also be "persons" capable of the exercise of religion for purposes of RFRA: the Dictionary Act makes no distinction between family-owned corporations and multinational conglomerates. The prospect of divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric—enabling those companies to then seek exemptions from generally applicable law on the basis of the corporations' asserted religious exercise—is a further reason to conclude that Congress could not have intended petitioners' interpretation of the statute.

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pari materia with it. See Nat'l League of Cities Amicus Br. 9. RLUIPA prohibits a state or local government from "implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of *a person*, including a religious assembly or institution," unless the government satisfies a compelling-interest test. 42 U.S.C. 2000cc(a)(1) (emphasis added). The phrase, "including a religious assembly or institution" (*ibid.*), in this provision reflects the category of entities that Congress intended RLUIPA to cover, and those entities bear no relationship to for-profit corporations. See *Maracich* v. *Spears*, 133 S. Ct. 2191, 2201 (2013) (applying the "familiar * * * interpretive rule that 'words and people are known by their companions'") (citation omitted). Congress intended RLUIPA to be a "narrowly focused" measure that would "provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith." 146 Cong. Rec. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch). To permit for-profit, commercial corporations to challenge zoning and land-use regulations under RLUIPA would "dramatically expand the statute's reach" and deeply intrude on local prerogatives, contrary to Congress's intent. Nat'l League of Cities Amicus Br. 26.

Even with respect to closely held corporations, the question of how to determine what, if any, religion a corporation exercised would prove vexing in many cases. See Jewish Soc. Policy Action Network (JSPAN) Amicus Br. 14-15 (discussing series of common circumstances, including disagreement among owners and changes in ownership, that would make it difficult to attempt to ascertain what religion a for-profit corporation exercised); U.S. Women's Chamber of Commerce (Women's Chamber) Amicus Br. 6 (discussing likely "disputes about any given corporation's religious identity, including whether such an identity exists, how it should be determined, and what accommodations, if any, should be sought on its basis"); Corporate and Criminal Law Professors Amicus Br. 19 ("Shareholders in closely-held and family-owned businesses often find themselves in disputes over values."). Nor can the limitation to closely held corporations be justified on the basis of size—closely-held corporations include candy giant Mars, Inc. (more than $27 billion in revenues and 64,000 employees) and Cargill, Inc. (more than $110 billion in revenue and 150,000 employees). See *America's Largest Private Companies*, Forbes (Nov. 6, 2008), http://www.forbes.com/2008/11/03/largest-private-companies-biz-privates08-cx_sr_1103private_land.html (last visited Feb. 10, 2014).

Because for-profit corporations (unlike typical religious non-profits) compete with other companies for commercial advantage, permitting them to secure religion-based exemptions from generally applicable laws would also pose serious market distortion concerns. See *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 291-292, 299, 303-306 (1985)

(rejecting free-exercise challenge to applicability of minimum-wage and overtime requirements to "the commercial activities of a religious foundation" and observing that "the payment of substandard wages would undoubtedly give [the foundation] and similar organizations an advantage over their competitors").

For example, this Court has interpreted the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, not to cover teachers in church-operated parochial schools. See *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 504-507 (1979); see *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (only non-profit entities exempt on this basis). Allowing a for-profit enterprise to obtain a RFRA exemption from the NLRA could give that company a substantial advantage over its competitors. See JSPAN Amicus Br. 19 (discussing case in which employer stated that "the teachings of the Seventh Day Adventist faith * * * prohibited it from recognizing, bargaining with, or even operating with the presence of a labor union").

d. Permitting for-profit corporations to seek religion-based exemptions from generally applicable law would create serious entanglement concerns. Untethered from the distinction between for-profit and non-profit entities, courts considering RFRA claims presumably would have to evaluate whether a for-profit corporation was sufficiently "religious" to have free-exercise rights. See *University of Great Falls*, 278 F.3d at 1340-1343. Yet, as Judge O'Scannlain has explained, this Court "has repeatedly cautioned courts against venturing into [the] constitutional minefield" of attempting to differentiate between "the 'religious' or 'secular' nature" of an

activity. *Spencer*, 633 F.3d at 730 (O'Scannlain, J., concurring); accord *Amos*, 483 U.S. at 343 (Brennan, J., concurring in the judgment) (A "case-by-case" determination of "whether an activity is religious or secular" would "result[] in considerable ongoing government entanglement in religious affairs.").

Interpreting RFRA to exclude claims by for-profit corporations obviates the need for such an intrusive inquiry because "[t]he fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation." *Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment); see *University of Great Falls*, 278 F.3d at 1344; *Spencer*, 633 F.3d at 734 (O'Scannlain, J., concurring) ("[A]n organization's status as a nonprofit bolsters a claim that its purpose is nonpecuniary.").[6]

3. Excluding for-profit corporations (and individuals in their capacity as shareholders, managers, or

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[6] Petitioners rely (Br. 31-32) on Judge Kleinfeld's separate concurring opinion in *Spencer*, in which he stated that "[n]onprofit status affects corporate governance, not eleemosynary activities." 633 F.3d at 746. Judge Kleinfeld made that statement in the context of arguing that non-profit status was not sufficient, by itself, to qualify an entity for a religious exemption and that the exemption should be limited to a *smaller* group of entities, see *id.* at 745-748, not a larger one, as petitioners contend. Judge Kleinfeld concluded that, to qualify for the religious exemption in Title VII, an organization must show that "it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and *does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts*." *Id.* at 748 (emphasis added). Conestoga would plainly not qualify as a religious organization under Judge Kleinfeld's test.

directors of for-profit corporations) from seeking RFRA exemptions is entirely consistent with *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 342 (2010). Petitioners quote (Br. 27) that decision for the proposition that "First Amendment protection extends to corporations." But the Court in *Citizens United* was discussing the Speech Clause, not the Free Exercise Clause. See 558 U.S. at 342; see also *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 628 (6th Cir. 2013), petitition for cert. pending, No. 13-482 (filed Oct. 15, 2013). *Citizens United* "represent[ed] the culmination of decades of Supreme Court jurisprudence recognizing that all corporations speak." *Gilardi*, 733 F.3d at 1214; see Pet. App. 17a (noting that *Citizens United* "cited to more than twenty cases * * * in which the Court recognized that First Amendment free speech rights apply to corporations"). That body of precedent stands in stark contrast to the utter absence of any decision by this Court concluding that a for-profit corporation has free-exercise rights.

That contrast is not the result of happenstance. For-profit corporations—in particular, those that own newspapers—have long disseminated core political speech to society at large. See *Bellotti*, 435 U.S. at 780-781; see also *Citizens United*, 558 U.S. at 353-354 (modern corporate-owned media companies are the same "types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted," namely, newspapers owned by individuals). There is no comparable history of a central role played by for-profit commercial corporations in the exercise of religion.

Similarly, this Court has recognized that corporate speakers contribute ideas and arguments on matters of public concern, thus implicating the First Amendment interests of listeners. See *Bellotti*, 435 U.S. at 783 (observing that the Court's free-speech cases involving corporations are based in part on the Speech Clause's "role in affording the public access to discussion, debate, and the dissemination of information and ideas"); see also *Citizens United*, 558 U.S. at 354 (discussing corporations' contributions to "the 'open marketplace' of ideas protected by the First Amendment"); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-562 (1980) (protection for commercial speech "assists consumers and furthers the societal interest in the fullest possible dissemination of information"). There is no comparable history of a central role of for-profit corporations in advancing the free exercise of religion by individuals and the religious organizations they have chosen to form. Indeed, the third-party interests at stake here are those of petitioners' employees and their covered family members, who would be affirmatively harmed —not benefitted—by the corporate exemption that petitioners seek.

4. Finally, the upheaval that would be caused by petitioners' requested extension of RFRA's protections to for-profit corporations is exacerbated by petitioners' approach to defining "substantial burden" under RFRA. 42 U.S.C. 2000bb-1(a); see 42 U.S.C. 2000bb-1(b).

The Hahns believe that "human life begins at conception," J.A. 100, and they object to drugs and devices that could "prevent the implantation of a human embryo into its mother's uterus," Pet. Br. 4. They

allege that it would substantially burden their religious exercise for the group health plan sponsored by Conestoga to provide health coverage that would "pay for, facilitate, or otherwise support" access by employees to such drugs and devices. Pet. App. 10g-11g (Verified Compl. ¶ 32). Those sincere religious beliefs are, of course, entitled to respect. Under RFRA, courts are not to inquire into the validity of a religious tenet or evaluate whether it is "central" to a plaintiff's "system of religious belief." 42 U.S.C. 2000cc-5(7)(A); see 42 U.S.C. 2000bb-2(4); *Thomas* v. *Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981).

But petitioners would go much further. They contend that the courts' review of "substantial burden" extends *only* to the question whether the government's "pressure to violate one's religious beliefs" is substantial. Pet. Br. 34 (capitalization altered). That is not correct. As the government explains in its *Hobby Lobby* brief (at 32-37), the sincerity of a religious belief is a separate question from whether a plaintiff's religious exercise is substantially burdened. And the answer to the substantial-burden question is a legal one that must be informed by settled principles regarding which injuries are cognizable and which are not. See *Bowen* v. *Roy*, 476 U.S. 693, 701 n.6 (1986) (declining to defer to a plaintiff's contention that his religious exercise was substantially burdened).

In a variety of contexts, courts reject claims when a proffered injury is too attenuated or the independent actions of third parties are part of the chain of causation. See, *e.g.*, *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268-269 (1992) (discussing "judicial tools used to limit a person's responsibility for the consequences of that person's own acts," including a

requirement of "some direct relation between the injury asserted and the injurious conduct alleged"). Likewise, a court may conclude that a burden is not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs. Under these principles, petitioners have not alleged a substantial burden.

Petitioners' contrary approach would subject much of the United States Code to RFRA's compelling-interest test. A plaintiff could point to any provision, assert that it substantially burdens his religious exercise, and (so long as the claim was sincere and a penalty was attached to the provision) require the government to justify the provision as the least restrictive means of advancing a compelling government interest. Cf. *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679-680 (D.C. Cir. 2008) (accepting the sincerity of prisoner's religious objection to government's extraction of DNA from any of his "bodily specimen[s] that contain[] DNA," but rejecting "the legal conclusion, cast as a factual allegation, that his religious exercise [was] substantially burdened" by such extraction).

That approach would wreak havoc on the administrative schemes set up by the federal government, as individual for-profit companies and their owners could claim a substantial burden imposed by any number of requirements—not only the requirement to provide the critical women's preventive-health coverage at issue here, but also requirements that for-profit corporations cover recommended vaccinations, pay certain taxes, or hire employees without regard to race or

gender. Nor are these merely the product of a fertile imagination; one need only look at the cases on which petitioners rely as illustrations of the point. See, *e.g.*, *McClure* v. *Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985), appeal dismissed, 478 U.S. 1015 (1986) (cited in Pet. Br. 20-21) (claim by employer that its religion prevented it from hiring (among others) "a young, single woman working without her father's consent or a married woman working without her husband's consent"). In any event, no power to force the government to defend potentially all of its regulation of for-profit corporations under a compelling-interest test has ever been recognized by this Court.

Conestoga is a for-profit corporation that pays money to finance covered benefits under its health plan. Decisions whether to claim such benefits are made by independent third parties: plan participants and beneficiaries (acting in consultation with their health-care providers), who have their own rights with respect to the group health plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, see p. 40, *infra*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote* v. *Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting). And the Hahns, as owners of the corporation, are a step further removed from the employees' decision than is the employing corporation itself. In that situation, Congress could not have intended RFRA to apply.

B. Petitioners' Claims Would Fail Even If The Contraceptive-Coverage Provision Were Subject To The Compelling-Interest Test

Conestoga would not be exempt from the contraceptive-coverage provision even if that provision were subject to the compelling-interest test. See 42 U.S.C. 2000bb-1(b). The contraceptive-coverage provision advances compelling governmental interests and is the least restrictive means to achieve them.

1. The contraceptive-coverage provision advances compelling governmental interests

a. Protection of rights of Conestoga's employees and their dependents in a comprehensive insurance system

The Affordable Care Act and its preventive-services coverage provision advance the compelling interest in ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. Individualized religion-based exemptions from that system would directly and materially harm the very individuals the insurance system was intended to benefit—including the 950 full-time employees of Conestoga and their covered family members.

Congress provided those plan participants and beneficiaries a privately enforceable right to coverage of recommended preventive services without cost sharing. The exemption sought here would extinguish that right and intrude upon the autonomy of those individuals, who would be required to pay for such services out of pocket or go without the services most appropriate for them if they could not afford to pay.

Thus, "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant" before the court, *O Centro*, 546 U.S. at 430-431. An exemption for Conestoga would directly and tangibly harm Conestoga employees and their covered family members. Petitioners' brief nowhere acknowledges that the exemption they seek would burden these known individuals.

As explained in the government's *Hobby Lobby* brief (at 42-45), the importance of protected employee interests is further underscored in this context by the preventive-services coverage provision's status as an amendment to the comprehensive employee-benefit framework of ERISA. See 29 U.S.C. 1185d (Supp. V 2011). ERISA allocates rights and responsibilities among private parties (employers, group health plans, and employees), not just between the government and employers such as Conestoga. The preventive-services coverage provision establishes rights that ERISA plan participants and beneficiaries may enforce in court against group health plans without any involvement by the government. See 29 U.S.C. 1132(a)(3); see also 29 U.S.C. 1132(a)(1)(B) and (5); 29 U.S.C. 1001(b). There is no reason to conclude that Congress intended to disrupt the ordering of private rights and responsibilities between employer and employee (and between an ERISA plan and its participants and beneficiaries) under ERISA by allowing RFRA to be used to impose a patchwork of exceptions to those private obligations and to deprive participants and beneficiaries of statutorily guaranteed benefits.

If petitioners were to prevail here, myriad other asserted religious objections by employers could pro-

vide bases for RFRA claims for exemptions from ERISA-required coverage (and employee-protection statutes more generally). In this "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606 (plurality opinion), employers might assert religious objections to coverage of "virtually all conventional medical treatments," including immunizations, blood transfusions, anti-depressants, medications derived from pigs, and gene therapy. *Grote*, 708 F.3d at 866 (Rovner, J., dissenting); see American College of Obstetricians & Gynecologists Amicus Br. 30-37 (discussing religion-based objections to vaccines, fertility treatment, hospice care, and any conventional medical care); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1174 n.8 (10th Cir. 2013) (en banc) (Briscoe, C.J., concurring in part and dissenting in part), cert. granted, No. 13-354 (oral argument scheduled for Mar. 25, 2014). The result would be a patchwork of unpredictably incomplete coverage for employees, dictated by the religious beliefs of their employers' shareholders.

These are not the kind of "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law" and that the Court found misplaced in *O Centro*. 546 U.S. at 435-436. The Court made clear in *O Centro* that "the Government can demonstrate a compelling interest in uniform application of a *particular program* by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435 (emphasis added); see *id.* at 436. And it cited as an example *Lee*'s conclusion that "mandatory participation is indispensable to the fiscal vitality of the social securi-

ty system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 435 (quoting *Lee*, 455 U.S. at 258, 260). In this case, the "particular program"—a uniform set of privately-enforceable employee benefits under ERISA—would not function as Congress intended if it were subject to employer opt-outs of the kind sought by petitioners. Cf. *Lee*, 455 U.S. at 259-260 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

b. Health of Conestoga employees and their dependents

The contraceptive-coverage provision directly and materially advances the public health, which is unquestionably a compelling governmental interest. *E.g.*, *Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), aff'd *sub nom. Seven-Sky* v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012). And, in particular, the provision advances the health of Conestoga's employees and covered dependents, as well as their children. "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte* v. *Sebelius*, 735 F.3d 654, 725 (7th Cir. 2013) (Rovner, J., dissenting), petition for cert. pending, No. 13-937 (filed Feb. 6, 2014). This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but

rather a concrete and specific one, supported by a wealth of empirical evidence.[7]

i. As demonstrated in the government's *Hobby Lobby* brief (at 46-47), use of contraceptives reduces the incidence of unintended pregnancies; helps women improve birth spacing;[8] assists women for whom pregnancy is contraindicated because of an underlying health condition avoid pregnancy;[9] and offers im-

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[7] Petitioners note that "Congress * * * did not include contraception" in the Act, Br. 14, but that observation misunderstands the statutory scheme. Congress set out four general categories of preventive services that must be covered in accordance with the recommendations of medical experts. See pp. 2-3, *supra*; Gov't *Hobby Lobby* Br. 4. Congress did not, for example, enumerate the particular immunizations that must be covered without cost-sharing. Likewise, it did not specify which preventive services for women should be covered, instead assigning that determination to HRSA, which in turned looked to the experts at the Institute of Medicine for recommendations.

[8] Amicus American College of Obstetricians and Gynecologists explains (Br. 13) that "[p]regnancies that are too frequent and too closely spaced, which are more likely when those pregnancies are unintended, put women at significantly greater risk for permanent physical health damage," and that "[i]nadequate spacing between pregnancies can increase the risk of low birth weight, preterm birth, and small size for gestational age."

[9] Amicus American College of Obstetricians and Gynecologists notes (Br. 14-15) that contraception "helps to protect the health of those women for whom pregnancy can be hazardous, or even life-threatening." Amicus National Health Law Program also explains (Br. 7-8) that a "number of commonly prescribed pharmaceuticals are known to cause impairments in the developing fetus or to create adverse health conditions for the pregnant woman" and that "[a]ccess to contraception" is thus "critical" for women taking those medicines. See *id.* at 9-17 (explaining that standards of care for women with a number of medical conditions for which pregnancy is contraindicated recommend access to contraception).

portant preventive health benefits unrelated to pregnancy.[10]

By requiring coverage of all recommended preventive services for women without cost sharing, Congress entrusted the decision whether to use such services to women and their health-care professionals alone. Accordingly, a woman, guided by medical advice and her own religious and moral beliefs, determines whether to use contraceptive services and which ones to use. Petitioners' requested accommodation would effectively put a third party in the room during these conversations between the woman and her health-care professional: the employer, which would decide which (if any) of the recommended services will be available to the woman without cost sharing based on *the employer's* or *its shareholders'* asserted religious beliefs. RFRA should not be interpreted to require such an intrusion into private medical decisionmaking.

ii. Petitioners launch a broadside attack against the efficacy of contraceptives in preventing unintended pregnancies and against the proposition that reducing cost and logistical barriers to obtaining contraceptive services promotes their use. See Pet. Br. 54-58. Congress specifically assigned to HRSA the task of determining which preventive health services should be part of women's health coverage without cost sharing, and HRSA in turn asked the experts at the Institute of Medicine for their recommendations. The

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[10] Amicus Ovarian Cancer National Alliance explains (Br. 4, 6) that, for many women, "contraceptives provide significant medical benefits wholly unrelated to preventing pregnancy" and that oral contraceptives and IUDs "are a potentially life-saving cancer-preventive treatment."

Institute's recommendation that such preventive services should include all FDA-approved contraceptives is consistent with the expert views of numerous major professional medical organizations. See Gov't *Hobby Lobby* Br. 46; see also National Health Law Program Amicus Br. 4-6. That recommendation is also consistent with coverage policy reflected in other statutory and regulatory schemes, including those of the majority of States.[11] The Court should reject petitioners' invitation to second-guess the scientific and medical consensus on the benefits for women of contraceptive coverage. In any event, petitioners' specific arguments fail.

Petitioners, citing data from the Guttmacher Institute, contend that contraceptive coverage is not necessary because "89% of women who are at risk of unintended pregnancy are already using contracep-

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[11] See generally Nat'l Health Law Program Amicus Br. 17-22. The Health Maintenance Organization (HMO) Act of 1973, 42 U.S.C. 300e *et seq.*, requires HMOs to provide "family planning services." 42 U.S.C. 300e(b) & 300e-1(H)(iv). Health benefits provided to members of the military and their covered dependents include "care related to * * * the prevention of pregnancy," 10 U.S.C. 1074d(b)(3); see 10 U.S.C. 1077(a)(13), and, in particular, coverage for IUDs and all prescription contraceptives, 32 C.F.R. 199.4(e)(3)(i)(A). Congress directed the Indian Health Service to provide "reproductive health and family planning" services. 25 U.S.C. 1603(11)(G)(xix); see 25 U.S.C. 1621b(a). The Medicaid statute requires coverage of "family planning services and supplies" for all categorically needy beneficiaries. 42 U.S.C. 1396d(a)(4)(C) (Supp. V 2011). In addition, 28 States "require insurers that cover prescription drugs to provide coverage of the full range of FDA-approved contraceptive drugs and devices." Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives* 2 (Feb. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

tion." Pet. Br. 52; see *id.* at 55. As the Guttmacher Institute itself explains (Amicus Br. 10), however, petitioners "fundamentally fail[] to appreciate that having access to *some* method is far different than a woman consistently having access to the *best* method for her at a given point in her life." Likewise, "[s]ome contraceptive methods * * * are far more effective in practice than others." *Id.* at 12. For example, IUDs, one of the contraceptive methods petitioners seek to exclude from coverage under the Conestoga group health plan, are among the most effective—and also among the most expensive. See *id.* at 12-13 ("Compared with a couple relying on the hormonal IUD (with a failure rate of 0.2%), a couple relying on condoms is 90 times as likely to have an unintended pregnancy in one year, and a couple relying on oral contraceptives is 45 times as likely."); Gov't *Hobby Lobby* Br. 38 n.8 (IUDs cost $500 to $1000).

Again relying on data from the Guttmacher Institute, petitioners attempt to bolster their argument that contraceptive coverage without cost sharing will not have any benefits by observing that "only 12% of women cite cost as a reason for not using contraceptives." Pet. Br. 56. Of course, 12% represents millions of women, and, for them, "the impact can be enormous: In any given year, 85% of sexually active women not using a contraceptive method will become pregnant." Guttmacher Inst. Amicus Br. 15. In addition, "the 12% figure does not include the many more women who use less effective methods or forgo their desired method, due to cost." *Ibid.*

Indeed, "all highly effective methods are available only with a prescription and often at a substantial cost." Guttmacher Inst. Amicus Br. 15; see *id.* at 16

(noting that the cost of an IUD is nearly equivalent to a month's full-time salary at minimum wage); *id.* at 17 (annual expense of oral contraceptives represents two-thirds of an uninsured woman's annual total out-of-pocket health-care costs). Almost one-third of women would change their contraceptive method if cost were not a factor. See *id.* at 17. Only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, and women who would have to pay out-of-pocket expenses of more than $50 are only one-tenth as likely to obtain an IUD as women facing expenses below that threshold. *Id.* at 16.

It is thus not surprising that, "when Kaiser Permanente Northern California eliminated patient cost-sharing requirements for IUDs, implants, and injectables, the use of these devices increased substantially, with IUD use more than doubling." Guttmacher Inst. Amicus Br. 20; see *ibid.* (discussing study involving 9,000 St. Louis women, three-quarters of whom chose IUDs or implants ("a level far higher than in the general population") when they were offered at no cost). Amicus American College of Obstetricians and Gynecologists likewise canvases the extensive data demonstrating that health coverage is a "'major factor' for a woman when choosing a contraceptive method and determines whether she will continue using that method." Br. 17; see *id.* at 17-21.

Petitioners claim (Br. 56) that no data demonstrate that the laws in the 28 States requiring insurance carriers to cover contraceptives have "caused, or were even correlated with, a decline in unintended pregnancies." That is incorrect. "Privately insured women living in states that required private insurers to

cover prescription contraceptives were 64% more likely to use some contraceptive method during each month a sexual encounter was reported than women living in states with no such requirement, even after accounting for differences including education and income." Guttmacher Inst. Amicus Br. 19-20 (citing study).

c. Equal access for female Conestoga employees and dependents to health-care services

The contraceptive-coverage provision also advances the government's related compelling interest in assuring that women have equal access to recommended health-care services. 78 Fed. Reg. at 39,872, 39,887; see *Roberts* v. *United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and noting that "[a]ssuring women equal access to * * * goods, privileges, and advantages clearly furthers compelling state interests"); see *Catholic Charities of Sacramento*, 85 P.3d. at 92-94 (finding that California's contraceptive-coverage requirement "serves the compelling state interest of eliminating gender discrimination"). Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 18 (2011); Gov't *Hobby Lobby* Br. 49-51.

Without any citation, petitioners posit (Br. 53) that "much" of the differential between what women and men pay for health care "is completely unrelated to contraception." They go on to suggest (*ibid.*) that Conestoga employees should therefore be satisfied with the women's preventive services for which Conestoga is willing to provide coverage, such as "breast-feeding supplies, well-woman visits, and screenings for cancer and blood pressure." Congress intended recommended preventive services to be covered as a comprehensive package, however, not on an a la carte basis, with employers making the selections. And, as discussed above, there is ample evidence that the cost of contraceptives is a significant barrier to their use and thus to the health benefits they can provide.

d. The government's compelling interests are not undermined by other features of the Act and its implementing regulations

Petitioners assert (Br. 58-60) that the interests advanced here cannot be compelling because the contraceptive-coverage provision does not apply to exempted religious institutions, employers with grandfathered group health plans, and small employers. Petitioners are mistaken.

i. The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. 78 Fed. Reg. at 39,874; see 45 C.F.R. 147.131(a).[12] As explained above,

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[12] The regulations also authorize accommodations for certain other religious non-profit employers, see p. 4, *supra*, but, outside of the limited circumstances in which such an employer utilizes a "church plan" exempt from regulation under ERISA, see *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-cv-2611, 2013 WL 6839900, at *10, *13-*14 (D. Colo. Dec. 27, 2013), injunc-

there is a long American tradition of protecting the autonomy of a church through exemptions of this kind. See pp. 25-29, *supra*; see also *Korte*, 735 F.3d at 677; *Hosanna-Tabor*, 132 S. Ct. at 705-706. Moreover, in establishing the religious-employer exemption, the implementing Departments explained that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that those employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

As explained above, see p. 28, *supra*, it would be perverse to hold that the government's provision of a targeted religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would *discourage* the government from accommodating religion, the opposite of what Congress intended in enacting the statute. See *Catholic Charities of Diocese of Albany*

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tion pending appeal granted, No. 13A691, 2014 WL 272207 (Jan. 24, 2014), these accommodations ensure that employees will retain access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations. These accommodations for eligible organizations are themselves subject to a number of RFRA challenges by objecting religious non-profit employers that seek a complete exemption without having to fulfill the terms of a self-certification requirement. See, *e.g.*, *Little Sisters*, *supra*; *University of Notre Dame* v. *Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), injunction pending appeal denied, No. 13-3853 (7th Cir. Dec. 30, 2013).

v. *Serio*, 859 N.E. 2d 459, 464 (N.Y. 2006) (rejecting contention that state contraceptive-coverage requirement was not "neutral" for purposes of Free Exercise Clause because of exemption for churches and observing that "[t]o hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion"), cert. denied, 552 U.S. 816 (2007).

Indeed, *Lee* rejected an accommodation claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as it emphasized that Congress *had* provided religion-based exemptions for self-employed individuals, *id.* at 260-261. "Confining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, and Congress's provision of such an exemption did not undermine the government's interest in enforcing the law outside the exemption's confines.

Likewise, Congress has exempted religious nonprofit institutions from certain employment regulations. See p. 26, *supra*. Although petitioners declare it "arbitrary" (Br. 47) to exempt a church but not a for-profit manufacturer, in fact the distinction reflects a longstanding tradition. There is no practice of extending religious exemptions to entities operating in the "commercial, profit-making world." *Amos*, 483 U.S. at 337. Nor have statutory or regulatory exemptions for religious non-profit entities been invoked as a basis to require that for-profit corporations also be granted religion-based exemptions.

ii. Petitioners also assert (Br. 58-60) that the Affordable Care Act's grandfathering provision, see 42

U.S.C. 18011 (Supp. V 2011); 45 C.F.R. 147.140(g), undermines any claim that the interests here are compelling. That provision does not have the effect of creating a permanent class of grandfathered plans exempt from the preventive-services coverage provision. It is instead a transitional measure that has the effect of phasing in compliance with a number of the Act's requirements (not just the contraceptive-coverage and other preventive-services coverage provisions) as a plan makes one or more specified changes, such as an increase in cost-sharing requirements above a certain threshold, a decrease in employer contributions beyond a certain threshold, or the elimination of certain benefits. The impact of this provision is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Consistent with that impact, the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

The effective phase-in of requirements under the Act through grandfathering does not reflect any assessment by Congress of the relative importance of the contraceptive-coverage provision—any more than it reflects a judgment about the relative importance of colorectal-cancer screening, immunizations, or any of the other recommended preventive services likewise subject to the transitional phase-in. More generally, the compelling nature of an interest is not diminished merely because the government phases in a regulation

advancing it in order to avoid undue disruption. Cf. *Heckler* v. *Mathews*, 465 U.S. 728, 746-748 (1984) (noting that "protection of reasonable reliance interests is * * * a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). As explained in the government's *Hobby Lobby* brief (at 54), Congress specified that various crucial Affordable Care Act provisions would not be immediately effective. Those post-2010 effective dates do not call into question the compelling nature of the interests these key provisions advance. To hold to the contrary would require Congress immediately and universally to implement a new law, without any transition period, mitigation of disruption, or balancing of competing interests, or else risk a conclusion that the law advances no compelling interest.

iii. The preventive-services coverage provision applies without regard to the size of the employer, 42 U.S.C. 300gg-13 (Supp. V 2011). Petitioners note (Br. 59) that employers with fewer than 50 full-time-equivalent employees are exempt from a *different* provision, 26 U.S.C. 4980H, which subjects certain large employers to a tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. 4980H(c)(2)(A). By relying on this large-employer tax provision, petitioners necessarily suggest that *none* of the Act's provisions regulating group health plans is supported by a compelling interest, given that small employers face no tax penalty for failing to offer a plan in the first place. Yet federal statutes often include exemptions for small employers, and such provisions have never been held

to undermine the interests served by those statutes. See Gov't *Hobby Lobby* Br. 55-56.

Petitioners also overlook the fact that Congress expected the employees of small businesses that choose not to offer group health coverage to receive the required preventive-services coverage through other means. Such employees can be expected to obtain coverage on a health insurance exchange, and all policies offered on exchanges provide contraceptive coverage without cost sharing. See 45 C.F.R. 147.130; see also 26 U.S.C. 36B (providing tax credits for eligible individuals for insurance purchased on exchanges); 26 U.S.C. 5000A (minimum coverage provision).[13] Thus, the RFRA exemption petitioners seek would not place Conestoga employees in the same position as employees of small employers not providing health coverage. Conestoga's employees would be denied coverage that those other employees could obtain via the health insurance exchanges.

This case bears no resemblance to *Lukumi* and *O Centro*, on which petitioners rely when they discuss the preventive-service coverage provision's "exemptions." Pet. Br. 44-48, 60. In *Lukumi*, exemptions in the statute resulted in a "gerrymander," through which "few if any killings of animals [were] prohibited other than Santeria sacrifice." 508 U.S. at 536; see *id.* at 534 ("The record in this case compels the conclusion

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[13] Petitioners also rely (Br. 59) on the religious exemptions in 26 U.S.C. 5000A, but those provisions are inapposite because they pertain only to the requirement that non-exempted individuals maintain minimum coverage or pay a tax penalty. See *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 101-102 (4th Cir.) (discussing the "health care sharing ministry" and "religious conscience" exemptions in Section 5000A), cert. denied, 134 S. Ct. 683 (2013).

that suppression of the central element of the Santeria worship service was the object of the ordinances."). In *O Centro*, the exemption from the Controlled Substances Act that was sought by 130 members of a Christian Spiritist sect for the sacramental use of hoasca was "essentially indistinguishable" from the exemption for the sacramental use of peyote that had already been granted to hundreds of thousands of members of Native American tribes. *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part); see *O Centro*, 546 U.S. at 433. Here, unlike in *Lukumi*, there is no suggestion that the government has targeted a specific religious group, and, unlike in *O Centro*, the exemption that petitioners seek is fundamentally different from the statutory and regulatory provisions to which they attempt to analogize it.

2. Petitioners' alternative proposals are not less-restrictive means

Petitioners also contend that the government has less restrictive means of advancing its interests, by, for example, "expanding access to federal programs, such as Medicaid," providing "additional funding to state contraceptive programs," or offering "a tax credit to any women it believes suffer from the cost of buying their own contraception." Pet. Br. 64. But RFRA's less-restrictive means test does not require *Congress* to create or expand federal programs.

In any event, petitioners' proffered alternatives would not effectively implement Congress's goals. As the agencies implementing the preventive-services coverage provision have explained, "the Affordable Care Act contemplates providing coverage of recommended preventive services through the existing em-

ployer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888. "Imposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women." *Ibid.*[14]

The agencies also explained that petitioners' alternative suggestion of tax credits to offset the expense of contraceptives would be ineffective. See 78 Fed. Reg. at 39,888. As an initial matter, the agencies to which Congress assigned authority for implementing the preventive-services coverage provision "lack the statutory authority to implement such [a] proposal." *Ibid.* Moreover, "[r]eliance only on tax incentives would also depart from the existing employer-based system of health coverage, would require women to pay out of pocket for their care in the first instance, and would not benefit women who do not have sufficient income to be required to file a tax return." *Ibid.* "Such barriers would make a tax incentive structure less effective than the employer-based system of health coverage in advancing the government's compelling interests." *Ibid.*

Rather than adopting one of those alternatives, Congress reasonably set certain minimum, privately enforceable standards for private plans in order to

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[14] Title X of the Public Health Service Act (42 U.S.C. 300 *et seq.*) "is the nation's only dedicated source of federal funding for safety net family planning services." National Health Law Program Amicus Br. 23. "Safety net programs like Title X are not designed to absorb the unmet needs of higher-income, insured individuals." *Id.* at 24.

advance the statute's employee-protection, public-health, and gender-equality goals. The preventive-services coverage provision is the least restrictive means of doing so. That is especially true given that an objecting employer retains the option of choosing not to offer a group health plan at all (thus allowing its employees to obtain individual policies with coverage for all recommended preventive services on the insurance exchanges, where many would qualify for subsidies) and potentially being subject to a tax instead. See 26 U.S.C. 4980H.

Petitioners' contention that the contraceptive-coverage provision is invalid because the government could instead itself pay the cost of contraceptive services for Conestoga's employees is also impossible to reconcile with *Lee*. On their theory, the government itself should have financed Social Security benefits directly to Lee's employees, as a less restrictive alternative to requiring that Lee pay Social Security taxes. The Court did not find such a government-funded scheme to be a less restrictive alternative in *Lee*, and it should not do so here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 300gg-13 (Supp. V 2011) provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guide-

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

lines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

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[2] So in original. The period probably should be a semicolon.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

2. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify bur-

dens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

3. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

4. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

5. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

6. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

7. 45 C.F.R. 147.130 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task

Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group

health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(*1*) The inculcation of religious values is the purpose of the organization.

(*2*) The organization primarily employs persons who share the religious tenets of the organization.

(*3*) The organization serves primarily persons who share the religious tenets of the organization.

(*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office

visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as *Example 1.* As the result of the screening, the individual is diag-

nosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in

paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) *Out-of-network providers.* Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immuniza-

tion Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. *See* § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

8. 45 C.F.R. 147.131 provides:

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and oper-

ates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group

health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or

plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—insured group health plans and student health insurance coverage.* For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for con-

traceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/ student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/ institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) *Reliance*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) *Application to student health insurance coverage.* The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

9. 29 C.F.R. 2590.715-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed sep-

arately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) *Out-of-network providers.* Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medi-

cal management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation

or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years beginning on or after September 23, 2010. *See* § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

10. 29 C.F.R. 2590.715-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and § 2590.715-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without impos-

ing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-

2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must

segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible or-

ganization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies

with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

11. 26 C.F.R. 54.9815-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 54.9815-2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i)-(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits.* [Reserved]

(3) *Out-of-network providers.* [Reserved]

(4) *Reasonable medical management.* [Reserved]

(5) *Services not described.* [Reserved]

(b) *Timing.* [Reserved]

(c) *Recommendations not current.* [Reserved]

(d) *Effective/applicability date.* April 16, 2012.

12. 26 C.F.R. 54.9815-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of

this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and 26 CFR 54.9815-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party admin-

istrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accord-

ance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage*—insured group health plans—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services* (i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third par-

ty administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans* (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

Health Resources and Services Administration, Department of Health and Human Services

Women's Preventive Services Guidelines

Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being

The Affordable Care Act—the health insurance reform legislation passed by Congress and signed into law by President Obama on March 23, 2010—helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Women's Preventive Services Guidelines Supported by the Health Resources and Services Administration

Under the Affordable Care Act, women's preventive health care—such as mammograms, screenings for cervical cancer, prenatal care, and other services—generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS commissioned an

IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depend-

	appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	ing on a woman's health status, health needs, and other risk factors.* (see note)
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for pregnant women identified to be at high risk for diabetes.

Human papillomavirus testing.	High-risk human papillomavirus DNA testing in women with normal cytology results.	Screening should begin at 30 years of age and should occur no more frequently than every 3 years.
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.
Counseling and screening for human immunedeficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with	As prescribed.

	reproductive capacity.	
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.	

* *Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs, Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.*

** *The guidelines concerning contraceptive methods and counseling described above do not apply to women*

who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF - 327 KB)